

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Cablevision of Paterson)	CSR-5947-E
d/b/a Cablevision of Allamuchy)	
)	
Petition for Determination of Effective)	
Competition in Allamuchy, New Jersey (NJ0027))	
)	
Cablevision of Warwick, LLC)	CSR-5948-E
)	
Petition for Determination of Effective)	
Competition in Montague (NJ0190) and)	
Portions of Sandyston (NJ0628), New Jersey)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2002

Released: September 19, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Cablevision of Paterson d/b/a Cablevision of Allamuchy and Cablevision of Warwick, LLC ("Cablevision") have filed with the Commission petitions alleging that Cablevision is subject to effective competition from competing service providers in Allamuchy Township, Montague Township and the Layton and Branchville portions of Sandyston Township, New Jersey (collectively, the "Communities"). Cablevision alleges that its cable system serving the Communities is subject to effective competition, pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act"),¹ and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission's rules, and seeks revocation of the certification of the New Jersey Board of Public Utilities' Office of Cable Television ("OCTV") to regulate basic service rates.² Cablevision bases its allegation of effective competition on the competing services provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and EchoStar Communications Corporation ("EchoStar"). The New Jersey Division of the Ratepayer Advocate ("DRA") and the OCTV filed comments, to which Cablevision filed a consolidated reply.

¹47 U.S.C. § 543.

²47 C.F.R. § 76.905(b)(2).

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. In most cases, the relevant franchise area is that which is delineated in the cable operator's franchise.⁵ We have, however, acknowledged that in some limited circumstances a cable operator may voluntarily redefine its franchise area through its own conduct.⁶ In doing so, we indicated that the fact that a cable system's construction was not yet complete would not, in of itself, demonstrate franchise redefinition.⁷

3. The DRA and OCTV allege that Cablevision has redefined its Allamuchy Township franchise so that its operations roughly parallel the boundaries of the Allamuchy-Panther Valley Census Designated Place ("Panther Valley CDP").⁸ The Panther Valley CDP comprises the most populous portion of Allamuchy Township and encompasses 1,430 or 84.5% of the Township's 1,692 households.⁹ The DRA and OCTV contend that Cablevision and its predecessor have refused since 1990 to extend plant to serve areas outside the Panther Valley CDP, including certain neighborhoods which are served by Comcast Cablevision of Northwest New Jersey ("Comcast").¹⁰ Cablevision asserts that its franchise area is the entirety of Allamuchy Township and indicates that it passes 1,595 households, or 94% of the Township, including areas outside the Panther Valley CDP.¹¹ Cablevision further states that it has subscribers in areas outside the Panther Valley CDP.¹² Cablevision argues that "all previously required construction within the franchise [was] complete" at the time of its recent franchise renewal and that it is only required to extend service to: (1) new portions of the Township meeting a specific density requirement, or (2) areas where potential subscribers are willing to share in plant extension costs.¹³

³47 C.F.R. § 76.906.

⁴47 C.F.R. § 76.905.

⁵ See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 1164, 1180 (1994) ("*First Order on Reconsideration*").

⁶ *Id.* at 1181.

⁷ *Id.*

⁸ DRA Comments at 5-8. The U.S. Census Bureau defines a Census Designated Place as "[a] statistical entity comprising a dense concentration of population that is not within an incorporated place but is locally identified by a name." See <<http://www.census.gov/dmd/www/glossary.html>>.

⁹ See DRA Comments at 5; OCTV Comments at 6; see also Profiles of General Demographic Characteristics, New Jersey (located at <http://www2.census.gov/census_2000/datasets/demographic_profile/New_Jersey/2kh34.pdf>).

¹⁰ DRA Comments at 6; OCTV Comments at 8-11.

¹¹ Reply at 4-7. Specifically, Cablevision states that it extended its plant in late 2001 to service a new development in the southern portion of the Township outside the Panther Valley CDP, and is in the process of extending service to another new development along Bald Eagle Drive. *Id.* at 6-7.

¹² Cablevision indicates that it has served for several years a cluster of subscribers outside the Panther Valley CDP near the Town Center. *Id.* at 6.

¹³ *Id.* at 6-7; Allamuchy Petition at Exhibit 6 (stating that "[t]he Petitioner has represented that all previously required construction within the franchise territory is complete"). Cablevision notes that the original 1981 franchise granted to its predecessor had a more stringent line extension requirement. Reply at 5 n10.

Cablevision acknowledges that in 1996 its predecessor reached an agreement with Comcast and the OCTV under which Comcast is authorized to service two small portions of the Township outside the Panther Valley CDP.¹⁴ Cablevision suggests that this was done as an accommodation to subscribers to avoid any contributions in aid of construction to Cablevision's predecessor under its then-operational franchise.¹⁵ The record reflects that the Township and OCTV consented to Comcast's service of these neighborhoods.¹⁶

4. We disagree with the DRA and OCTV and conclude that Cablevision's franchise area in Allamuchy consists of the entire Township. Unlike the *Century Cable of Northern California* case where the petitioner and another incumbent cable operator had effectively divided the relevant franchise area in half and failed to extend their service areas for fifteen years,¹⁷ Cablevision's system encompasses 94% of the households in the Township and is being extended in accordance with the line extension policy in its franchise. To the extent that Comcast passes between three and six percent of the households in the Township, we find it relevant that the OCTV consented to this arrangement in an effort to save residents plant extension costs under the franchise of Cablevision's predecessor.¹⁸ We have consistently held that "actual head-to-head competition is not a requirement of the competing provider test, nor, standing alone, indicative of franchise area redefinition."¹⁹ The fact that Cablevision has not yet filled out its entire franchise area, absent other facts, is insufficient evidence of franchise area redefinition. The DRA and OCTV have failed to meet their burden to show that Cablevision affirmatively restricted its service in Allamuchy. We consequently find that Cablevision's franchise area in Allamuchy consists of the entire Township, as reflected in Cablevision's franchise agreement, and will apply the competing provider effective competition test accordingly.²⁰

5. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the

¹⁴ Reply at 7. The parties dispute the size of the areas served by Comcast. Cablevision estimates 40-50 households while the OCTV believes that the number is "probably 50 to 100." *Id.* at 7; OCTV Comments at 8.

¹⁵ *Id.* at 7 n17.

¹⁶ OCTV Comments at Exhibit E.

¹⁷ *Century Cable of Northern California, Inc.*, 13 FCC Rcd 24153 (1998), *affirmed* 14 FCC Rcd 18604 (1999).

¹⁸ OCTV Comments at Exhibit E ("It should be noted that these residents could obtain service from US Cable of Allamuchy ... only upon contributions toward the cost of constructing a plant extension. Service secured under such a policy would cost the residents a considerable sum of money beyond the normal installation fee. Because of the proximity of Comcast's plant, Comcast has agreed to provide service to these ... residents at tariffed installation rates.").

¹⁹ See e.g., *Valley Center Cablesystems, L.P.*, 10 FCC Rcd 11940, 11945 (1995) ("Indeed, we note that the instant proceeding is not a case where the cable operator has engaged in no expansion ... [their] alleged failure to expand into areas served by other cable operators, by itself, is not grounds upon which to reverse the Bureau's decision [finding no franchise area redefinition]."); see also *Daniels Cablevision, Inc.*, 12 FCC Rcd 17410, 17418 (1997).

²⁰ Allamuchy Petition at Exhibit 6. We note that even with a redefined Allamuchy franchise equivalent to the Panther Valley CDP, Cablevision would meet the second prong of the competing provider effective competition test with a 15.45% DBS penetration rate (221 DBS subscribers ÷ 1,430 Census 2000 Panther Valley CDP households = .1545). Reply at 19-21.

households in the franchise area.²¹

6. Turning to the first prong of this test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.²² Cablevision has provided evidence of the advertising of DBS service in news media serving the Communities.²³ We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.²⁴ Cablevision has demonstrated that the Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in each of the franchise areas. Cablevision has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and EchoStar.²⁵ Therefore, the first prong of the competing provider test is satisfied.

7. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Cablevision has purchased a report from SkyTrends that identifies the number of subscribers attributable to the DBS providers in the Communities on a franchise-specific zip code plus four basis.²⁶ The DRA contests the accuracy of the SkyTrends data as including commercial accounts, which fall outside the scope of the competing provider test's definition of residential household subscribers.²⁷ Unlike SkyTrends' five digit zip code subscriber reports, its zip code plus four reports do not include

²¹ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

²² *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997). OCTV alleges that DBS service may not be technically available throughout Allamuchy since the surrounding area is hilly, heavily wooded, and mountainous. OCTV Comments at 11. OCTV, however, provides no demonstrable evidence of reception problems in the Township. As a result, OCTV has failed to overcome our presumption that DBS service is technically available nationwide.

²³ Allamuchy Petition at 3 and Exhibit 2; Montague and Sandyston Petition at 3 and Exhibit 2.

²⁴ *See* 47 C.F.R. § 76.905(g). *See also* Allamuchy Petition at 3-4 and Exhibits 4-5; Montague and Sandyston Petition at 4 and Exhibits 4-5. Exhibit 4 includes the channel lineup for Cablevision's cable system serving the Communities and Exhibit 5 contains the nationwide channel lineups of DirecTV and EchoStar.

²⁵ Allamuchy Petition at 2-4; Montague and Sandyston Petition at 2-4. OCTV suggests that because it did not observe any satellite dishes in at least one condominium community within Allamuchy, this was "possibly owing to local prohibitions on placement in common areas, and a lack of noncommon areas within [the complex]" which might restrict the technical availability of DBS service. OCTV Comments at 11. Cablevision maintains that it is not aware of any local rules or regulations in Allamuchy which affect the ability of residents to receive DBS service and cite in support the Commission's over-the-air-reception-device rules which prohibit local restrictions on the installation, maintenance or use of DBS antennas on property within the exclusive use or control of the antenna user. Reply at 16. We believe that OCTV's conclusion that the visual absence of DBS antennas in one housing community implicates the possible existence of local rules restricting the placement of DBS antennas is, absent additional facts or circumstances, attenuated in nature and insufficient to overcome our presumption that DBS service is technically available nationwide.

²⁶ Allamuchy Petition at 5 and Exhibit 8; Montague and Sandyston Petition at 6 and Exhibit 8.

²⁷ DRA Comments at 4-5.

commercial accounts.²⁸ As such, no reduction of the subscriber totals reported by SkyTrends is needed in the instant case.²⁹ The OCTV also disputes the use of SkyTrends data in favor of its own field observations which identify a greater concentration of DBS subscribers in the portions of Allamuchy Township not served by Cablevision.³⁰ The OCTV asks that these households be eliminated from our application of the competing provider test in Allamuchy since Cablevision and the DBS providers do not directly compete for customers in these areas.³¹ As discussed above, the competing provider test does not contain a head-to-head competition requirement. Cablevision may aggregate the subscriber totals from all competing providers, other than the largest MVPD, within each of its franchise areas in order to satisfy the 15 percent penetration threshold for that particular community.³² We have accepted SkyTrends zip code plus four data as a reasonable and sufficiently reliable source for DBS subscriber information for effective competition purposes.³³ OCTV provides no rationale which leads us to conclude that its anecdotal visual observations are inherently more reliable than the SkyTrends data submitted by Cablevision. Accordingly, we accept the SkyTrends subscriber data provided for the Communities and apply it towards the competing provider test's 15 percent penetration threshold.

8. Cablevision asserts that it is the largest MVPD in each of the Communities because Cablevision's subscribership exceeds the aggregate subscribership for the DBS providers.³⁴ Based upon the DBS providers' aggregate subscriber penetration level, calculated using 2000 Census and U.S. Postal Service household data as reflected in Appendix A,³⁵ we find that Cablevision has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each of the Communities. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Cablevision has submitted sufficient evidence demonstrating that its cable system serving the Communities is subject to effective competition.

²⁸ Reply at Exhibit 3.

²⁹ *But see Charter Communications*, DA 02-1919 at n13 (MB rel. Aug. 6, 2002).

³⁰ OCTV Comments at 5.

³¹ *Id.*

³² *See Time Warner Entertainment Co., L.P., et al., v. FCC*, 56 F.3d 151 (D.C. Cir. 1995).

³³ *Falcon Cable Systems Company II, a California Limited Partnership*, 17 FCC Rcd 4648, 4650-51 (2002).

³⁴ Allamuchy Petition at 5; Montague and Sandyston Petition at 6.

³⁵ Allamuchy Petition at 5 and Exhibit 7; Montague and Sandyston Petition at 6 and Exhibit 9.

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petitions for determinations of effective competition filed in the captioned proceedings by Cablevision of Paterson d/b/a Cablevision of Allamuchy and Cablevision of Warwick, LLC. **ARE GRANTED.**

10. **IT IS FURTHER ORDERED** that the certifications of the New Jersey Board of Public Utilities' Office of Cable Television to regulate basic cable service in Allamuchy Township, Montague Township and the Layton and Branchville portions of Sandyston Township, New Jersey **ARE REVOKED.**

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁶

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

³⁶47 C.F.R. § 0.283.

ATTACHMENT A

CSR-5847-E and CSR-5848-E

COMMUNITIES SERVED BY CABLEVISION OF PATERSON
D/B/A CABLEVISION OF ALLAMUCHY
AND CABLEVISION OF WARWICK, LLC

Communities	CUIDS	CPR*	Households⁺	DBS Subscribers	Cablevision Subscribers
Allamuchy Township	NJ0027	17.2	1,692	291	1,249
Montague Township	NJ0190	25.04	1,286	322	1,085
Layton/Branchville	NJ0628	25.00	632	158	284

*CPR = Percent of competitive DBS penetration rate.

⁺Households are 2000 Census for all communities except the Village of Layton where Cablevision employs U.S. Postal Service data.